IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 1056 of 1990

For Approval and Signature:

Hon'ble MR.JUSTICE R.K.ABICHANDANI

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

GAMBHIR NAVALSINH VASAVA - Orig. Accused - Appellant

Versus

STATE OF GUJARAT - Respondent

Appearance:

1. Criminal Appeal No. 1056 of 1990

MR JAL UNAVALA, Amicus Curiae for Appellant

MR MA BUKHARI, APP for Respondent - State

CORAM : MR.JUSTICE R.K.ABICHANDANI

Date of decision: 27/09/2001

ORAL JUDGEMENT

1. The appellant challenges the judgement and order dated 11th December 1990 convicting the appellant for the offence under section 377 of the Indian Penal Code and sentencing him to undergo rigorous imprisonment for a

period of three years and to pay a fine of Rs.500=00, in default of which to undergo further rigorous imprisonment for a period of six months.

2. The prosecution case was that, on 18th February 1989 in the evening around 5.30 p.m., the appellant accused committed sodomy on Bhupendra alias Bhupat who was 5 years old, by taking him on a terrace of a nearby bungalow and at that time, Bhupat started crying. His mother, Bachiben, on hearing cries of Bhupat, went to the terrace and had seen the incident. She took away her son and noticed that he was having injury and swelling on his anus and was bleeding from it. One neighbour Hamidaben also came there and she too noticed the injury on Bhupat. She stopped Gambhir, the accused, from going away. When Shanaji, father of Bhupat came, Bachiben informed him about the incident and he lodged the F.I.R.

3. The trial Court, relying upon the depositions of Bhupat and his mother Bachiben, medical and other evidence, found the accused guilty of the offence under section 377 of the Indian Penal Code and sentenced him as stated above.

4. Since the advocate on record was not present, Mr. Jal Unavala has been appointed as amicus curiae to assist the Court and has argued on behalf of the appellant accused. The assistance rendered by the learned counsel is appreciated.

5. It was contended by the learned counsel for the appellant that the evidence disclosed that there were quarrels between Bachiben and the accused in the past, and therefore, the likelihood of Bachiben's falsely implicating the accused cannot be ruled out. He further argued that the medical certificate issued in respect of examination of the accused disclosed that the accused did not have any injury on his private part. On this basis, it was argued that, having regard to the tender age of the victim, it would not be possible not to have any injury on his private part for the person who may have committed such offence. It was argued that absence of any injury on the accused was suggestive of the fact that he did not commit the offence. It was also argued that the trial court ought not to have relied upon the deposition of Bhupat who was only 5 years of age and could not be trusted his testimony because of the likelihood of his being tutored by his mother Bachiben, who as per the defence version was caught red-handed trying to steal rice from the hut of the accused, who was residing opposite her house.

6. The learned Additional Public Prosecutor, supporting the reasoning and findings of the trial Court, submitted that there was no error committed by the trial Court in convicting the accused and the sentence was justified.

7. The victim Bhupendra alias Bhupat has deposed at exh.7. He was not administered oath, because, he did not understand the sanctity of oath. In his deposition, he stated that he knew the accused and he was the same person who was sitting in the Court. He then stated that the accused had taken him to the terrace and committed sodomy on him. At that time, he had closed his mouth and eyes. He further stated that he started bleeding from his anus. The blood had fallen on the terrace as well as on the clothes which were removed. He has stated that the accused had made him bend on his knees at that time. Because it had pained him, he started crying. After he started crying, his mother came there. Thereafter, his father had taken him to the hospital. In his cross-examination, he has stated that his father had first taken him to the police station and thereafter to the hospital. His mother had told him in what way he should depose before the Court. He has admitted that his mother and Gambhir had quarrelled twice in the past. The quarrel was over rice and had taken place near their huts. He admitted that he was told by his mother to disclose to the Court that he had bled. He admitted that, on that day, he was climbing the staircase of the terrace and was also sliding on it. However, he clearly stated that he was injured, because, the accused had committed sodomy on him. He was not injured on any other part of his body.

7.1 On a close scrutiny of the deposition of this witness, it becomes clear that he has categorically stated in the examination-in-chief and maintained in his cross-examination that it was the accused who had committed sodomy on him, as a result of which he had started bleeding from his anus, and that when he started crying due to pain, his mother had come on the terrace. There was no reason for this boy of five years age to falsely implicate the accused on such an allegation. Even if his mother had told him as to in what way he should depose before the Court, it cannot be inferred that he was tutored to falsely depose. It is obvious that a boy of five years of age would be required to be told as to how he should behave in the Court, and that he should disclose the facts to the Court. It cannot be inferred from such parental counselling that he was

tutored to give a false deposition.

8. Bachiben, mother of Bhupendra alias Bhupat, in her deposition at exh.8, has stated that when she returned after delivering tiffin to her husband and did not find her son in the house and was searching for him, she heard him crying from the terrace of the nearby house. She therefore went on that terrace and saw the accused committing sodomy on her son. The clothes of her son were removed and the accused Gambhir had removed his clothes also and when she saw this, she raised cries. Neighbours and other persons therefore came there. They had seen that her son was bleeding. Gambhir was stopped there. She had noticed that her son was bleeding from the anus and there was a swelling on it. In the cross-examination, she denied the suggestion that she tried to commit theft of rice from the house of the accused or that she had falsely implicated the accused because of any such incident. She has maintained in the cross-examination that, because she heard her son crying on the terrace, she went there. She maintained that she had seen Bhupat and the accused without their clothes. Thereafter, she had taken away her son. In the evening, she went and called her husband and when her husband woke up Gambhir who was sleeping on the terrace, Gambhir had hit him with a log of wood. Thereafter, they had gone to the police station where the F.I.R. was lodged.

8.1 Bachiben's deposition clearly establishes that, on hearing the cries of her son, she had gone to the terrace and saw the accused and her son without clothes and her son bent on the knees and the accused having committed sodomy on him. She had also seen that her son was bleeding from the anus and there was a swelling on it. She fully corroborates the version of Bhupat.

8.2 Hamidaben, a neighbour in her deposition exh.40 has stated that when Bachiben started shouting, she had gone there and had seen that her son was bleeding from his anus. She has stated that, as the accused Gambhir was going away, she had stopped him. She has also stated that Bhupat was crying at that time and his knickers were in his hand. She has also spoken about the bloodstains on the knickers. Hamidaben's deposition supports the version of Bachiben that when she raised cries, neighbouring people came there. It also shows that Bhupat was bleeding from his anus and Gambhir was trying to go away and therefore, she caught him.

9. The medical evidence clearly supports the version of Bhupat and Bachiben. Dr. Pramodbhai Patel, in his

deposition exh.9, has deposed that he had examined Bhupendra at 1 O'clock morning on 19-2-1989 and had seen that there was an abrasion of 2 cm x 1/2 cm with diffused tender swelling on his anus posteriorly, red in colour. He had issued the certificate of injury which is at exh.10. According to his opinion, the boy was 4 to 5 years old. He has denied in the cross-examination that if an adult man had committed sodomy on a 4 or 5 year old boy, he would necessarily get atleast some injury on his private part. This part of the deposition of the medical expert negatives the contention raised on behalf of the appellant that, absence of injury on the private part of the accused would go to show that he did not commit the offence.

10. From the depositions of Bhupat, Bachiben and Hamida, as also from the deposition of Shanabhai who at exh.5 has stated that he was informed about the incident by his wife, and that he had seen his son Bhupat bleeding from anus and had gone to the police station and lodged the FIR exh.6, which discloses the name of the accused at the earliest point of time as the person who had committed the offence, it is established beyond any shadow of doubt that the accused had committed sodomy on this tender child of 5 years age. The positive evidence of his guilt cannot be brushed aside by an inference from absence of injury on the private part of the accused, especially when the medical expert has, in the cross-examination, stated that it was not necessary that such conduct should leave atleast a minor injury on the private part of the offender.

11. It will also be noticed that the underwear of the accused which is item - 3 referred to in the report of the chemical analyser exh.23, was found to be having stains of human blood. The knickers of the child were also having stains of human blood. The accused has not explained as to how his knickers were having stains of human blood. This circumstance will go against the accused person. However, even in absence of such circumstance, the ocular evidence which is absolutely reliable and corroborated by the medical evidence, clearly establishes the guilt of the accused beyond any reasonable doubt.

12. The trial Court has, for cogent reasons based on the material on record, rightly convicted the accused and the sentence imposed on him is the minimum that could have been imposed in the circumstances of the case. The appeal is, therefore, dismissed. The bail stands cancelled.

SEPTEMBER 27, 2001 [R.K.ABICHANDANI, J.]

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